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No. 83-1065

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**IN THE  
Supreme Court of the United States**  
**October Term, 1983**

COUNTY OF ONEIDA,  
COUNTY OF MADISON,

*Petitioners,*

v.

ONEIDA INDIAN NATION OF NEW YORK,  
ONEIDA INDIAN NATION OF WISCONSIN,  
ONEIDA OF THE THAMES BAND COUNCIL,  
and STATE OF NEW YORK,

*Respondents,*

No. 83-1240

STATE OF NEW YORK,

*Petitioner,*

v.

ONEIDA INDIAN NATION OF NEW YORK,  
ONEIDA INDIAN NATION OF WISCONSIN,  
ONEIDA OF THE THAMES BAND COUNCIL,  
COUNTY OF ONEIDA,  
and COUNTY OF MADISON,

*Respondents.*

**Petitions for a Writ of Certiorari to the  
United States Court of Appeals for the Second Circuit**

**BRIEF OF ONEIDA OF THE THAMES BAND  
COUNCIL IN OPPOSITION**

ROBERT T. COULTER  
*Counsel of Record*  
CURTIS G. BERKEY  
Indian Law Resource Center  
601 E Street, S.E.  
Washington, D.C. 20003  
(202) 547-2800

(i)

### **QUESTIONS PRESENTED**

1. Whether respondents have a cause of action for damages under the federal common law or the Trade and Intercourse Act for the wrongful occupation of their land.

2. Whether this action is barred by defenses based on state law or by 28 U.S.C. § 2145.

3. Whether the 1795 transfer was subsequently ratified by the United States.

4. Whether respondents' claims are justiciable.

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**BRIEF OF ONEIDA OF THE THAMES BAND  
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**PARTIES**

The County of Oneida, New York, and the County of Madison, New York, have petitioned this Court for a writ of certiorari in case number 83-1065 to review the Court of Appeals' holding of liability and damages for the wrongful

occupation of respondents' land. The State of New York has petitioned for a writ of certiorari in case number 83-1240 to review the holding of liability and damages and the holding that the State must indemnify the Counties. The Oneida of the Thames Band Council is a respondent in both cases. This brief in opposition responds to both petitions.

### **OPINIONS BELOW**

The opinion of the Court of Appeals is reported at 719 F.2d 525 (2d Cir. 1983). The other opinions are correctly listed in petitioners' briefs.

### **JURISDICTION**

This Court's jurisdiction is correctly stated in petitioners' briefs.

### **CONSTITUTIONAL, STATUTORY AND TREATY PROVISIONS INVOLVED**

The relevant constitutional, statutory and treaty provisions are set out in the briefs of petitioners and appendices.

### **STATEMENT OF THE CASE**

This action seeks to redress an historic and continuing wrong, the taking in 1795 of land belonging to the Oneida Nation in violation of federal law. Respondents, as direct descendants of the Oneida Nation, continue to suffer the ill-effects of the loss of land which resulted from the conveyance challenged in this action.

The decision holding petitioners liable for the wrongful

occupation and use of respondents' land is based on well-established principles of federal law. It is fully consistent with decisions of other federal courts and this Court. Moreover, the decision below does not finally resolve all of the issues raised in this case. For these and other reasons, this Court should decline to review this case.

As noted by the District Court, respondents have sought to have their rights in the subject land determined in the least disruptive fashion to the record owners. Decision on the Issue of Damages, October 5, 1981, Supplemental Appendix of Counties at 69a. Respondents have sought over a period of years to obtain a remedy by other means. See 434 F.Supp. 527, 531. When these efforts proved futile, this action was filed in order to establish the viability of the claim and to build a foundation for a possible negotiated settlement and legislative solution. Thus, this action is limited to damages for two years against two counties which occupy a small part of the claim area. No private parties were named as defendants nor was any other form of relief sought.

On November 11, 1971, the District Court dismissed the action on jurisdictional grounds and the Court of Appeals affirmed. 464 F.2d 916 (2d Cir. 1972). This Court reversed and remanded, holding that federal question jurisdiction in this case is based "on the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory rights to tribal land, wholly apart from the application of state law principles . . . ." 414 U.S. 661, 677 (1974).

Upon remand, the District Court held that respondents had proven a prima facie case of violation of the Trade and Intercourse Act, that the transfer was void, and, as a

result, respondents still own the subject land. 434 F.Supp. at 540, 548. The Counties were held liable for wrongful occupation as successors to the State. 434 F.Supp. at 548.

The District Court did not reach respondents' claim that New York's acquisition of Onedia land is void for violation of the federal treaties guaranteeing their rights to the land.

The essence of the District Court decision is that the State of New York knowingly and directly violated the Trade and Intercourse Act by acquiring Oneida land without the approval or ratification of the United States. Thus, the wrong which the District Court's decision vindicates is that the respondents have been deprived of their land in violation of federal law.

The Court of Appeals affirmed and remanded for further proceedings on three aspects of the damages issue. 719 F.2d at 530-537. The judgment against the State of New York was also affirmed. 791 F.2d at 542-544.

## **REASONS FOR DENYING THE WRIT**

### **I. This Case is Not Ripe for Review Because Substantial Issues Remain for Resolution by the Courts Below**

The decision below did not finally and conclusively resolve all the claims and issues raised in this case. The Court of Appeals remanded the issue of good faith occupation for "clarification" since it was unclear whether the District Court placed the burden of proof on the Counties or on the Oneidas. 719 F.2d at 542. The issue of whether the Counties can set off the value of improvements against the damages cannot be resolved without further evidentiary proceedings, since the Counties submitted only evidence of good faith since 1970 and, the Court of Appeals held, "[i]nasmuch as the Counties

had possession of the Oneidas' land since sometime in the 1800's, it is not enough that they establish good faith since 1970." 719 F.2d at 542. The Court of Appeals also remanded for a recalculation of damages at 100% of the fair rental value of the land. 719 F.2d at 542. This case is not appropriate for review until these issues are resolved.

Also, the rights of respondents to share in the award have not been determined by the District Court. 434 F.Supp at 538 n. 20. It would likewise be premature to review this case until these issues are resolved by the lower courts.

At this stage, a decision by this Court in favor of the petitioners would not finally dispose of respondents' claim to the subject land. Even if, for example, this Court were to grant the petition and conclude that there is no common law or statutory right of action, there would remain to be resolved respondents' claim that the 1795 transfer is void for violation of the federal treaties. 434 F.Supp. at 537, n. 19. Respondents claimed, as an alternative ground of relief, that the 1795 transfer is void because it violated respondents' rights under the Treaty of Fort Stanwix of 1784 and the Treaty of Canandaigua of 1794. The District Court has not considered this claim. Thus, it is quite possible that a decision by this Court would not finally resolve respondents' rights in the subject land.

### **II. The Importance of This Case is Limited Primarily to the Parties and Land Area Involved in this Case**

To clarify what is at stake here, it is important to note what is *not* involved in this case. This is not an action to recover land from record owners. No private landowners, whether individuals or corporations, have been sued here. The Counties' and State's exaggerated predictions about

widespread disruption and catastrophe arising from this action are based simply on speculation, not on facts in the record. Petitioners' conjecture about what respondents might do in the future should not be the basis for granting a petition for writ of certiorari.

None of the dire consequences of which the Counties and State complain have occurred. No landowner has been ejected. The controversy here is strictly limited to the respondents, the Counties and the State and the question of a damages remedy for wrongful occupation.

In none of the recent or pending cases has ejectment been ordered as a remedy for a violation of the Trade and Intercourse Act or the federal common law. That issue is not presented by this case. If and when ejectment actions are brought and decided by the lower courts, this Court will likely have an opportunity to review these actions. The concerns of the Counties and the State are more appropriately raised in a case which does in fact cause disruption. By contrast, this case, which seeks damages against only two governmental defendants for two years, is not a suitable vehicle by which to review these issues.

The Counties misrepresent many crucial facts. They assert that this action vindicates the claims of "the purported descendants of an Indian tribe which admittedly sold the land nearly two centuries ago" and which "acquiesced in" the good-faith occupation of the record owners. Counties' Petition at 9. In fact, the District Court found, on the basis of uncontradicted evidence, that respondents are the direct descendants of the Oneida Nation.

Moreover, it is a distortion of the record to characterize the 1795 transaction as a "sale." As the District Court found, the circumstances surrounding the Oneidas' pur-

ported consent to the transaction were fraught with irregularities.<sup>1</sup> 434 F.Supp. at 535.

Further, the Counties incorrectly state that the Oneidas "slept on whatever rights they may have had for 175 years." Counties' Petition at 15. The District Court specifically found to the contrary: "Despite these conditions of poverty and illiteracy, and although their attempts to redress grievances were totally futile, the Oneidas did protest the continuing loss of their tribal land." 434 F.Supp at 536. The protests continued up until the time this suit was filed. 719 F.2d at 529.

The number of Indian land claims which would be materially affected by the disposition of this case is not nearly so great as the Counties suggest. Again, the Counties offer only speculation about cases which may be filed at some unspecified date. The Counties fail to show how this case is relevant to or would affect the other Indian claims that have been filed or could be filed. Nor do the Counties distinguish among the myriad factual situations and legal theories which may determine the outcome of those cases.<sup>2</sup>

The potential for disruption of private real estate ownership is greatly exaggerated by the Counties and the

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<sup>1</sup>These included the fact that the State knew it was violating the Trade and Intercourse Act by negotiating with the Oneidas; the fact that the instrument was signed at a place where the Oneidas had never before made a treaty; and the fact that none of the individuals who signed was an Oneida chief and none was properly authorized to sign. 434 F.Supp. at 534-535.

<sup>2</sup>*Oneida Indian Nation of New York v. New York*, 691 F.2d 1070 (2d Cir. 1982) rests on an entirely different legal theory and facts, namely, that the alienation of Oneida land in 1785 and 1788 is void for violation of the Articles of Confederation and federal treaties.

State. The Houdenosaunee has not laid claim to the entire Northeast. Moreover, of the major eastern Indian land claims, four have already been settled by legislation.<sup>3</sup> Since voluntary settlement is a desirable way to resolve these claims, it is reasonable to anticipate progress toward settling the other claims in the same manner. In addition, many of the recent Indian land claims have been unsuccessful.<sup>4</sup> In any event, the possibility that the issues in this case might arise in other Indian land claims is not a sufficient reason for this Court to review this case. The lower federal courts are resolving these cases by uniformly applying settled principles. There is no present need for this Court to review the disposition of these cases.

<sup>3</sup>See Maine Indian Claims Settlement Act of 1980, 25 U.S.C. § 1721-1735 (Passamaquoddy Tribe, Penobscot Nation and the Houlton Band of Maliseet Indians); Rhode Island Indian Claims Settlement Act of 1978, 25 U.S.C. § 1701-1716 (Narragansett Tribe of Indians); Florida Indian Land Claims Settlement Act of 1982, 25 U.S.C. § 1741-1749 (Miccosukee Tribe of Indians); Mashantucket Pequot Settlement Act of 1983, P.L. 98-134, October 18, 1983.

<sup>4</sup>*Epps v. Andrus*, 611 F.2d 915 (1st Cir. 1979) (failure to establish tribal status); *Mashpee Tribe v. New Seabury Corp.*, 427 F.Supp. 899 (D. Mass. 1977), *aff'd* 592 F.2d 575 (1st Cir.), *cert. denied* 444 U.S. 866 (1979) (failure to establish tribal status); *James v. Watt*, 716 F.2d 71 (1st Cir. 1983) (lack of standing; Indian Commerce clause does not invalidate Indian land conveyance to the state); *Mashpee Tribe v. Watt*, 542 F.Supp. 797 (D. Mass. 1982), *aff'd* 707 F.2d 23 (1st Cir. 1983) (dismissed on res judicata grounds); *Chitimacha Tribe v. Harry L. Laws Co.*, 690 F.2d 1157 (5th Cir. 1982) (tribe precluded from asserting land claim by Louisiana Land Claims Acts of 1805 and 1807).

### III. The Decision Below is Consistent with Longstanding Principles of Federal Law

The Court of Appeals' decision is not novel. It correctly applied well-established principles of federal law which have been uniformly followed. No part of the decision conflicts or is inconsistent with the decisions of this Court, other circuit courts or district courts. This is not a case in which this Court's review is required to resolve a conflict in the law or to clarify relevant legal principles. There is no confusion among lower federal courts requiring this Court's attention.

This Court's 1974 decision in this case largely settled the central question for which review is requested: whether respondents have a cause of action to enforce federal restraints on alienation of their land as expressed in the Trade and Intercourse Act and the common law. In concluding that federal question jurisdiction existed, this Court held that respondents' cause of action arose under the Trade and Intercourse Act and certain federal treaties and that federal question jurisdiction "rests on the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory rights to tribal lands. . . ." 414 U.S. at 667.

The Court of Appeals properly interpreted and relied on this Court's 1974 decision in finding a cause of action to enforce Indian land rights. 719 F.2d at 530. Petitioners have offered no reasons why this Court should reexamine the settled principles affirmed in its 1974 decision.

This case presents no important questions of federal law which should be decided by this Court. The question of whether a federal common law right of action is available was settled by this Court over 160 years ago. *Johnson v.*

*M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). As this Court remarked some time later, *Johnson v. M'Intosh* stands for the proposition "[t]hat an action for ejectment could be maintained on an Indian right of occupancy and use, is not open to question." *Marsh v. Brooks*, 49 U.S. (8 How.) 223, 232 (1850).<sup>5</sup>

An unbroken line of authority in this Court recognizes a common law and statutory right of action to seek remedies for the taking of Indian land in violation of restraints on alienation.<sup>6</sup> The lower federal courts are in accord<sup>7</sup>

On the other hand, the question of whether the common law right of action is preempted by the Trade and Intercourse Act has not been decided by this Court, but there is no reason why it should be. The Court of Appeals' deci-

<sup>5</sup>See also, F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) 523 ("The right to protection of tribal possession through actions of ejectment, trespass or other similar possessory suits was affirmed early in the nation's history.")

<sup>6</sup>In *Smith v. Stevens*, 77 U.S. 321 (1870), this Court affirmed a remedy of ejectment for the unlawful conveyance of Indian land. The land had been deeded to a non-Indian in violation of a statutory provision requiring secretarial approval of sales. In *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941), this Court recognized a common law right of action for an accounting for all "rents, issues and profits" against trespassers on land to which Indians retained unextinguished title. See also, *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968) ("[T]he federal restrictions preventing Indians from selling or leasing allotted land without the consent of a government official do not prevent the Indian landowners, like other property owners, from maintaining suits appropriate to the protection of his rights.")

<sup>7</sup>*United States v. Allen*, 179 F.2d 13 (8th Cir. 1910) (Indians have "a clear right to maintain any suit necessary to set aside illegal conveyances of [their] property"); *United States v. Southern Pacific Transportation Co.*, 543 F.2d 676 (9th Cir. 1976) (common law right of action available to hold railroad liable for trespass damages arising from wrongful use of Indian land under right-of-way agreements which violated the Trade and Intercourse Act).

sion, along with a recent decision of the District Court for the Northern District of New York,<sup>8</sup> are the only judicial opinions on this issue. This issue is not ripe for consideration by this Court; it is more appropriately reviewed after the lower federal courts have more thoroughly illuminated all aspects of the issue.

In any event, the Court of Appeals' decision in this regard is correct. The Trade and Intercourse Act is not the type of comprehensive legislation which federal courts, including this Court, have found to preempt common law remedies.<sup>9</sup>

For similar reasons, this Court should not review the question of whether a right of action can be implied under the Trade and Intercourse Act. Review now would be premature. Moreover, this issue is not of recurring importance in Indian land claims litigation because a common law right of action is available to redress violations of the Act. Also, the issue is of secondary importance because the validity of Indian land transfers does not depend solely on the Trade and Intercourse Act. Quite independently of the Act, it is established as a matter of common law that conveyances of Indian land without the approval of the United States are void. *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. at 667-668. A decision by this Court on this issue would have very little effect on Indian land claims litigation.

<sup>8</sup>*Cayuga Indian Nation of New York v. Cuomo*, 565 F.Supp. 1297, 1319-1321 (N.D. N.Y. 1983) (finding no preemption).

<sup>9</sup>See, e.g., *Middlesex County Sewerage Authority v. National Sea Clammers Assoc.*, 453 U.S. 1 (1981) (Federal Water Pollution and Control Act and Marine Protection and Sanctuaries Act preempt common law nuisance remedies); *United States v. Kin-Buc, Inc.*, 532 F.Supp. 699 (D. N.J. 1982) (Clean Air Act preempts common law nuisance remedies).

The other issues raised by the Counties likewise do not warrant review. Judicial opinion is unanimous that state law delay-based defenses are inapplicable to actions brought by Indian tribes to remedy land rights violations.<sup>10</sup> This line of cases is based on sound principles; there is no reason for this Court to examine the issues.

The Court of Appeals' holding that 28 U.S.C. § 2145 can be used for guidance to determine whether respondents' claim is barred by any federal statute of limitations is also correct. It is in accord with other circuits which have considered the issue. See, e.g., *Capatai Grande Band of Mission Indians v. Helix Irrigation District*, 514 F.2d 465, 469-472 (9th Cir. 1975), cert. denied 243 U.S. 874 (1976). This Court's review is not warranted when there is no conflict among the circuits.

Similarly, there are no persuasive reasons to review the Court of Appeals' ruling of justiciability. The types of issues in this suit have consistently been held to be justiciable. As the Second Circuit has remarked: "... no Indian land claim has ever been dismissed on non-justiciability grounds." *Oneida Indian Nation of New York v. New York*, 691 F.2d 1070, 1081 (2d Cir. 1982); see also, *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F.Supp. 649, 664 (D. Me.), aff'd, 528 F.2d 370 (1st Cir. 1975).

<sup>10</sup>See, e.g., *Catawba Indian Tribe of South Carolina v. South Carolina*, 718 F.2d 1291, 1300 (4th Cir. 1983); *Cabazon Band of Mission Indians v. City of Indio*, 694 F.2d 634 (9th Cir. 1982); *Oneida Indian Nation of New York v. New York*, 691 F.2d 1070, 1083-1084 (2d Cir. 1982); *United States v. Forness*, 125 F.2d 928 (2d Cir. 1942), cert. denied, 316 U.S. 694 (1942); *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F.Supp. 798, 808 (D. R.I. 1976).

The Court of Appeals' holding that the 1795 transaction has not been ratified should not be reviewed. This issue is of importance only to the parties to this suit. In any event, the court applied the proper standard and correctly analyzed the subsequent treaties. *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941).

Finally, the issue of the State's Eleventh Amendment immunity from the Counties' indemnification claim should not be reviewed because the Court of Appeals' decision is fully consistent with this Court's decisions on the issue.

#### IV. The Decision Below Redresses in a Fair and Just Manner the Continuing Violation of Respondents' Rights

The Counties suggest that this action unfairly seeks to invalidate an arms-length sale of land on a mere technical violation of a federal statute. In fact, this action seeks redress for the dispossession of Oneida land at the hands of officials of the State of New York who acquired the land through overreaching and in direct and knowing violation of the Trade and Intercourse Act. See 719 F.2d at 528-529. The Court of Appeals' decision vindicates the longstanding policy of the United States of protecting Indian land, which can only be acquired by treaty with the United States. See *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 345 (1941).

The Oneidas have been victimized by the violation of federal law which deprived them of their land. As the Court of Appeals remarked, between 1795 and 1846 "[s]ocial and economic forces, including poverty, famine, alcoholism, and pressures on the Oneidas to move West resulted in the alienation of virtually all of their remaining

New York acreage." 719 F.2d at 529. The injury to Oneida society and people caused by this wrong is severe. Respondents continued to suffer the consequences.

### **CONCLUSION**

For the reasons stated, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

**ROBERT T. COULTER**  
*Counsel of Record*  
**CURTIS G. BERKEY**  
**INDIAN LAW RESOURCE CENTER**  
601 E Street, S.E.  
Washington, D.C. 20003  
(202) 547-2800  
  
Counsel for Oneida of the  
Thames Band Council

**Date: February 27, 1984**